

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Kelly Keel, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 2, 2023

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **MEGATEL HOMES, L.L.C. (Applicant)**
TCEQ DOCKET NO. 2023-0850-MWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0850-MWD

APPLICATION BY MEGATEL
HOMES, L.L.C. FOR NEW TPDES
PERMIT NO. WQ0016162001

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST FOR HEARING

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this Response to Request for Hearing on the application in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Megatel Homes, L.L.C. (Megatel or Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016162001. The Commission received a hearing request from the City of Mansfield (Mansfield). For the reasons stated herein, OPIC respectfully recommends the Commission find that the City of Mansfield is an affected person, and further recommends that the Commission grant its hearing request.

B. Description of Application and Facility

Megatel Homes applied for a new permit to authorize the discharge of treated domestic wastewater at an average daily flow not to exceed 0.20 million gallons per day (MGD) in the Interim I phase, a daily average flow not to exceed

0.40 MGD in the Interim II phase, and an annual average flow not to exceed 1.00 MGD in the Final phase.

The facility would be a suspended growth single-stage nitrification activated sludge process plant operated in the conventional mode. Treatment units in the Interim I phase would include an onsite lift station, manual bar screens, two aeration basins, a secondary clarifier, a chlorine contact chamber, and two aerobic digesters. Interim II phase would add flow splitting weirs. Treatment units in the Final phase would add an additional secondary clarifier and a dechlorination system.

The plant site would be located approximately one mile southwest of the intersection of Bedford Street and North Farm-to-Market Road 157, in Johnson County. The proposed wastewater treatment facility would serve a residential subdivision located approximately 2.25 miles west of the intersection of Highway 287 and Highway 360, near the City of Mansfield.

The treated effluent would be discharged to Reece Branch, then to Mountain Creek, then to Joe Pool Lake in Segment No. 0838 of the Trinity River Basin. The unclassified receiving water use is limited aquatic life use for Reece Branch and high aquatic life use for Mountain Creek. The designated uses for Segment No. 0838 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

Megatel Homes' application was received on May 4, 2022, and declared administratively complete on June 8, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in the *Dallas Morning News* on June 11, 2022. The Executive Director (ED) completed the technical review on September 22, 2022. The Notice of Application and Preliminary Decision was published in the *Dallas Morning News* on October 21, 2022. The public comment period ended on November 21, 2022, and the ED filed the Response to Comments on May 8, 2023. The deadline for filing requests for contested case hearing and requests for reconsideration of the ED's decision was June 12, 2023.

II. APPLICABLE LAW

The Application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under 30 Texas Administrative Code (TAC) § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;

- (2) identify the requestor's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.

30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), an "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;

(6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and

(7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

(1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;

(2) the analysis and opinions of the executive director; and

(3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

30 TAC § 55.203(d).

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission must grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B)-(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

III. ANALYSIS OF HEARING REQUEST

A. Whether the requestor is an affected person

The City of Mansfield made timely comments and a request for contested case hearing. The request indicates that Mansfield is a local government¹ with the authority to inspect the proposed facility for compliance with various state environmental statutes and TCEQ rules and orders issued thereunder.² In addition to these investigatory powers, Mansfield has the authority to file civil suit in the same manner as the TCEQ for injunctive relief, civil penalties, or both.³ Furthermore, the one-mile radius of the proposed facility includes land that falls within the city limits of Mansfield.

The concerns raised in the request include whether the proposed facility will adversely affect human health and safety, animal life, or the environment; whether the proposed facility will adversely impact water quality; whether the proposed facility is in violation of TCEQ's regionalization policy; and whether the Applicant's technical capabilities raise any issues regarding Applicant's ability to comply with the draft permit.

Governmental entities, including local governments, with authority under state law over issues raised by the application, may be considered affected persons.⁴ Furthermore, when determining whether local governments are

¹ Tex. Health & Safety Code §§ 361.003(17) and 382.003(8); and Tex. Water Code § 26.001(18).

² Tex. Health & Safety Code §§ 361.032; and Tex. Water Code § 26.173.

³ Tex. Water Code § 7.351.

⁴ 30 TAC § 55.203(b).

affected persons, factors related to their statutory authority over or interest in the issues relevant to the application should be considered.⁵ Mansfield's concerns are protected by the law under which the application will be considered. Further, the City has demonstrated that it has authority under state law over the issues it has raised. Finally, there is substantial proximity between Mansfield's city limits and the proposed facility. Therefore, OPIC finds that Mansfield qualifies as an affected person.

B. Which issues raised in the hearing request are disputed

The affected requestor raised the following disputed issues:

1. Whether the proposed facility will adversely affect human health and safety, animal life, or the environment;
2. Whether the proposed facility will adversely impact water quality;
3. Whether the proposed facility is in violation of TCEQ's regionalization policy; and
4. Whether the Applicant's technical capabilities raise any issues regarding Applicant's ability to comply with the draft permit.

C. Whether the dispute involves questions of fact or of law

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. The issues raised here are issues of fact.

⁵ 30 TAC § 55.203(c).

D. Whether the issues were raised during the public comment period

Issues 1-4 in Section III.B. were specifically raised by Mansfield during the public comment period.

E. Whether the hearing request is based on issues raised solely in a withdrawn public comment

No public comments were withdrawn in this matter. Therefore, the hearing request is not based on issues raised in withdrawn public comments.

F. Whether the issues are relevant and material to the decision on the application

The hearing request raises issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii). To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Human Health and Safety, and Animal Life

The requestor raised concerns about adverse effects to water quality and the consequential impacts on human health, animal life, and the environment. The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality Standards (Standards) in Chapter 307 require that the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life,

operation of existing industries, and ... economic development of the state....”⁶ According to § 307.6(b)(4) of the Standards, “Water in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.” Additionally, “[s]urface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.”⁷ Finally, 30 TAC § 307.4(e) requires that nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, designated, presumed, or attainable use. As Chapter 307 designates criteria for the regulation of water quality, the protection of human health and safety, and the protection of animal life, Issues No. 1-2 are relevant and material to the Commission’s decision regarding this application.

Regionalization

TCEQ’s regionalization policy comes from Section 26.081 of the Texas Water Code, which implements “the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.” TCEQ’s wastewater permit application requires the applicant for a new permit to provide information concerning other wastewater treatment facilities

⁶ 30 TAC § 307.1.

⁷ 30 TAC § 307.4(d).

that exist near the applicant's proposed treatment facility site. The Applicant is required to state whether any portion of the Applicant's proposed service area is located in an incorporated city, whether its proposed service area is located within another utility's certificate of convenience and necessity area, and whether there is a facility, or any sewer collection lines located within the three-mile area surrounding the proposed facility site. Accordingly, Issue No. 3 is relevant and material to the Commission's decision on this Application.

Technical Capability

The requestor raised concerns regarding Applicant's level of experience, managerial competence, and financial resources as they apply to Applicant's ability to effectively construct and manage the proposed facility. Evidence of competency is required by 30 TAC § 330.59(f). Accordingly, Issue. No. 4 is relevant and material to the Commission's decision on this application.

G. Maximum expected duration for the contested case hearing

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). To assist the Commission in setting a date by which the judge is

expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

V. CONCLUSION

Having found that the City of Mansfield qualifies as an affected person in this matter, OPIC respectfully recommends the Commission grant its hearing request and refer Issue Nos. 1-4 specified in Section III.B. for a contested case hearing at SOAH with a maximum duration of 180 days.

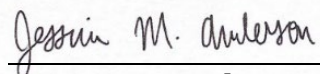
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2023, the original of the Office of Public Interest Counsel's Response to Request for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jessica M. Anderson

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